United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7475

To be argued by
FREDERICK J. MAGOCHIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPHINA DUCHESNE as Administratrix of the Estate of Pauline Perez, et al.,

Plaintiffs-Appellants,

- against -

JULE M. SULZMAN, et al.,

Defendants-Appellees,

THE NEW YORK FOUNDLINGS HOSPITAL and ST. JOSEPH'S HOME OF PEEKSKILL,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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PRELIMINARY STATEMENT

This brief is submitted on behalf of The New York Foundling Hospital and St. Joseph's Home of Peekskill, defendants-appellees on the appeal from the District Court's (Metzner, J.) dismissal of this Civil Rights action. We deem it appropriate to note at the outset that despite plaintiffs-appellants' denouncements to the contrary, The New York Foundling Hospital and St. Joseph's Home of Peekskill for over 100 years have been dedicated to providing essential services to the needy children and families of this State with due regard to the dignity and right of those individuals.

We deal here with the Civil Rights Act and that Act alone. We contend that plaintiffs-appellants brief, Point One, is superfluous to the issue raised on this appeal. The only real issue presented is whether Boone v. Wyman is dispositive of this appeal and we contend that the District Court correctly determined that it was.

ISSUES

Whether the District Court erred as matter of law in dismissing the first and second causes of action of the complaint against The New York Foundling Hospital and St. Joseph's Home of Peekskill.

Whether The New York Foundling Hospital and St. Joseph's Home of Peekskill were acting under color of state law in retaining custody of the infants, Daniel Cruz and Marisol Lopez.

Whether The New York Foundling Hospital and St. Joseph's Home of Peekskill were immune from liability under the Civil Rights Act.

Whether costs and attorneys' fees should be imposed upon plaintiffs-appellants for pursuing a patently frivolous appeal.

STATEMENT OF THE CASE

In August 1972, Pauline Perez, individually and on behalf of her two minor children, Daniel Cruz and Marisol Lopez, plaintiffs-appellants,* commenced a Civil Rights Action against The New York Foundling Hospital and St. Joseph's Home of Peekskill, as well as against the Commissioner of Social Services of the City of New York (hereinafter the "Commissioner") and various employees of the Department of Social Services (defendants-appellees). The complaint (A-1) charged that both The New York Foundling Hospital and St. Joseph's Home of Peekskill, under color of state law, violated the Civil Rights Act:

> (1) in denying plaintiff Perez due process by retaining custody of her two children, Daniel and Marisol, against her wishes (First Cause of Action, A-6);
>
> (2) In denying the infant plaintiffs due process by their unlawful separation and detention [i.e. from plaintiff Perez] (Second Cause of Action, A-8);
>
> (3) in denying plaintiff Perez and the infant plaintiffs equal protection of the law (Third Cause of Action, A-9);
>
> (4) in denying all plaintiffs due process by removing them and maliciously detaining them (Fourth Cause of Action, A-10);
>
> (5) in falsely imprisoning the infants (Fifth Cause of Action, A-11).

*For the sake of clarity, the plaintiffs-appellants will be referred to as "plaintiff Perez" and the "infant plaintiffs," respectively. The New York Foundling Hospital and St. Joseph's Home of Peekskill will be referred to collectively as the "agencies."

The District Court's dismissal of the third cause of action (equal protection) was previously affirmed by this Court, 499 F 2d 761 (2nd Cir., 1974). The fifth cause of action (false imprisonment) was expressly abandoned by plaintiffs-appellants prior to trial and dismissed by the District Court in its pre-trial order (A-41). No appeal has been taken from the dismissal of the fifth cause of action so that it is not at issue herein.

Of the remaining three causes of action, the District Court dismissed as a matter of law the first and second causes of action (denial of due process) at the close of the agencies' case. The remaining fourth cause of action, charging the agencies with infliction of mental distress, an intentional tort, went to the jury which promptly returned a verdict in favor of the agencies.

Plaintiffs-appellants only appeal from the dismissal of the first and second causes of action alleging denial of due process which was premised on Boone v. Wyman, 295 F. Supp. 1143 (S.D.N.Y., 1969), aff'd. 412 F 2d 857 (2nd Cir., 1969), cert. den. 396 U.S. 1024 (1970).

The correctness of these dismissals by the District Court will be discussed herein under Point One. The issue of jurisdiction and immunity will be addressed in our Points Two

and Three. Lastly, we will urge the Court to award costs and attorneys' fees to defendants-appellees in Point Four.

STATEMENT OF THE FACTS

The appellants' brief and Appendix is fraught with scandalous, irrelevant and immaterial matter and should be disregarded. Accordingly, the present statement of facts will set forth the relevant facts which are almost entirely uncontradicted and it is submitted, establish beyond peradventure the correctness of the decision of the District Court.

Plaintiffs-appellants, in their brief, rail against these agencies with all sorts of innuendoes that fly in the face of the facts of the case. They utterly fail to recognize that the jury, in throwing out the fourth cause of action, determined that The New York Foundling Hospital and St. Joseph's Home of Peekskill never intentionally or willfully or maliciously inflicted or caused plaintiffs-appellants mental or emotional anguish or distress. This stands as the law of facts of the case. All of appellants' counsel's inveighing against the agencies is unjustified, improper and without factual basis.

The Parties:

The New York Foundling Hospital and St. Joseph's Home of Peekskill are authorized voluntary child care agencies which are ministering with unrecited expertise and with untold dedication to the temporal needs of several thousand dependent children entrusted to their care. Both have engaged in these eleemosynary endeavors -- providing homes, shelter, clothing, nursing, and attending to the medical, dental psychological, social, recreational and human needs of underprivileged, deprived, distraught, dependent and destitute children such as the infants herein -- for over 100 years.

Pauline Perez is the mother of the infants, Daniel Cruz and Marisol Lopez. Pauline Perez unfortunately suffered from chronic mental illness and was repeatedly hospitalized as a result of her psychiatric illness. In fact, from August 1960 to June 1972, this unfortunate woman was hospitalized on at least 19 occasions and at least four different treatment facilities throughout New York (Addendum "A").

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*Regrettably, on December 30, 1975, immediately prior to the trial of this action, Pauline Perez died. Josephine Duchesne was substituted as plaintiff. Marisol Lopez resides with a foster family who are in the process of adopting her. Daniel Cruz yet remains at St. Joseph's Home of Peekskill.

The Events:

On or about December 16, 1969, Pauline Perez was again hospitalized for psychiatric illness at Bellevue Hospital. Prior to her admission, she left her son, Daniel Cruz, then age seven years, and her infant daughter, Marisol Lopez, then age six months, with a neighbor. This neighbor, herself unable to care for Daniel and Marisol in addition to her own children and in view of her own physical condition (i.e., in the final term of her pregnancy) requested emergency placement of the children with the Commissioner of Social Services.

The Commissioner, after an investigation into the circumstances of plaintiff Perez and the infant plaintiffs, complied with this request.* There was no acceptable alternative to placement then available, in view of plaintiff Perez's continued hospitalization and the absence of family members to assume the infants' care. (Ex. 1 BCW case record). Marisol was referred by the Commissioner to The New York Foundling Hospital and was accepted into the nursery. Daniel, being too old for The New York Foundling Hospital nursery, was

*This was not the first such placement for Daniel Cruz. He was previously placed by the Commissioner with The New York Foundling Hospital in 1963, when plaintiff Perez was hospitalized (Ex. 6 NYFH, entry dated 1/6/70).

placed with St. Joseph's Home of Peekskill. Plaintiff Perez was also visited at Bellevue Hospital and her incapacity confirmed.

Six days later, on December 22, 1969, plaintiff Perez appeared at the Bureau of Child Welfare and allegedly requested the return of her children, which request was denied. On December 23, 1969, plaintiff Perez visited Marisol on the nursery at The New York Foundling Hospital. Three days later, plaintiff Perez was again psychiatrically hospitalized at Bellevue Hospital and subsequently was transferred to Manhattan State Hospital where she remained until her release on February 11, 1970, when she was to begin out-patient treatment with the Lower Manhattan Aftercare Clinic.

On or about February 2, 1970, The New York Foundling Hospital and St. Joseph's Home of Peekskill each received authorization for long term care for the infant plaintiffs from the Commissioner of Social Services pursuant to Section 395 of the Social Services Law. Plaintiff Perez also signed medical consent forms and releases for Marisol while in The New York Foundling Hospital on December 23, 1969, medical consent forms and releases for Daniel for St. Joseph's Home of Peekskill

on February 20, 1970, and subsequently signed baptismal consent for Daniel on March 27, 1971 (Addendum "B").

Daniel visited at his mother's home on two occasions in June and August 1970, and was returned on each occasion by plaintiff Perez to St. Joseph's Home of Peekskill. In the fall of 1970, Daniel stated he would not return to his mother's care. Plaintiff Perez was readmitted to the hospital in October 1970.

Plaintiff Perez took no legal steps to regain custody of her children until March 1972, when a Petition for Writ of Habeas Corpus was allowed.*

The decision (Metzner, J.) dated April 26, 1976, (A-44) frames the issue as follows:

> "The initial custody in December 1969, was clearly proper since the facts show an emergency situation with the mother in the psychiatric ward of Bellevue Hospital and no one to take care of the children. The record will show that plaintiffs have conceded that there is no issue as to this. The issue is whether the defendants are liable for having continued custody to March 7, 1972, despite the pleas of the mother for the return of her children." (underscoring added)

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*However, the case record of The New York Foundling Hospital (Ex. 6, entry dated 5/5/71) reveals that plaintiff Perez engaged counsel (Mobilization for Youth) as early as May 1971, but took no action.

The issue so couched, precludes extended discussion of the facts surrounding the placement of infant plaintiffs. Indeed, plaintiffs-appellants at trial, expressly abandoned any contention that the initial removal and placement was improper. Nor are the agencies culpable for the alleged wrongs concerning the children's placement, since the facts conclusively show the agencies played no role in decision to place the children. Only a question of law exists as to whether the agencies' retention of custody of the children against plaintiff Perez's will violated plaintiffs-appellants' right to due process of law.

SUMMARY OF THE ARGUMENT

The District Court concluded that Boone v. Wyman was dispositive of appellants' due process claims. Boone involved the identical legal issue and suprisingly similar factual allegations as presented herein. We contend that the Boone v. Wyman decision previously affirmed by this Court and in wh:ch the United States Supreme Court denied certiorari destroys appellants' argument.

Moreover, we contend that the District Court lacked jurisdiction since the agencies were not acting under color of state law in their retention of custody of the infants. Additionally under both a state statutory scheme and federal caselaw, the agencies are immune from the liability sought to be imposed.

Lastly, we seek costs and attorneys' fees from appellants for pursuing a patently frivolous appeal which has caused these charitable private institutions to divert money and energy in the defense of this litigation from funds which could have been expended on the dependent children under their care.

POINT ONE

BOONE v. WYMAN IS DECISIVE OF THE DUE PROCESS CLAIMS PRESENTED HERE

Appellants have improperly sought to expand the narrow issue presented by this appeal to embrace issues otherwise not germane to this suit. The sole issue is whether the District Court's reliance upon Boone v. Wyman was correct. Instead of meeting this issue head-on, appellants ramble on about a constitutional right to family and the like and only broach the crux of this appeal at page thirty-five of their brief.

Boone v. Wyman reached the constitutional issue presented here. There a unanimous Court of Appeals for the Second Circuit affirmed the District Court's dismissal of a Civil Rights Action alleging denial of due process on facts paralleling those presented herein, and the United States Supreme Court denied certiorari. 295 F. Supp. 1143 (S.D.N.Y.); aff'd. per curiam, 412 F 2d 857 (2nd Cir. 1969), cert. denied, 396 U.S. 1024 (1970). Boone v. Wyman by itself disposes of appellants' contention.

The issues and facts presented by Boone are remarkably similar to those presented herein. Both involve Civil Rights Actions alleging denial of due

process. The defendants in both cases are virtually the same.* Plaintiffs in both cases were represented at least initially by the same law office (Mobilization for Youth), albeit different counsel.

Boone was no mere custody suit as appellants contend (Appellants' Brief, p. 41) which the District Court eschewed entertaining. Nothing could be further from the truth. Mr. Boone was the father of an out of wedlock child who was placed with welfare officials without his consent and without affording him a hearing. Mr. Boone repeatedly demanded the return of his child to him, but his requests were denied without affording him a hearing on his demands. He then sued those welfare officials, claiming that the failure to afford him a hearing denied him due process and violated the Civil Rights Act. He wasn't seeking custody in the District Court as appellants suggest, he was seeking judgment.

Ms. Gonzalez, plaintiff-intervenor in the Boone suit, had placed her child in care, sought its return and was denied custody by the same welfare department. She

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*with one noticeable exception, here the child care agencies with whom the children were placed by the Commissioner of Social Services are named defendants, while in Boone they were not.

contended that her child was detained over her objection and without affording her a hearing.

Both sought injunctive and declaratory relief pursuant to the Civil Rights Act, not custody as appellants erroneously assert.

In Boone, the plaintiffs asserted that they had been denied due process of law because the defendants were depriving them of custody of their children, despite their demands, without affording them a hearing. Here, the complaint asserts that the agencies' retention of custody of the infant plaintiffs over plaintiff Perez's objections, without affording her a hearing, similarly denied her due process of law.

The Court in Boone framed the issue as follows:

> The substance of plaintiffs' contention with respect to § 383 [i.e. Social Services Law] is that they were denied procedural due process because the officials of the authorized agencies, when a request was made for return of custody, did not hold a hearing or institute an action in a court of law to show unfitness on the part of the parent requesting custody. id at 1149 (underscoring added)

The Court then proceeded to dispose of this contention by stating:

Aside from the fact that neither plaintiff claims to have requested a hearing to determine plaintiff's fitness plaintiffs fail to present a due process question for the reason that they erroneously assume that the children are permanently committed to defendants' custody and that they are bound by defendants' interim refusal to turn over custody immediately. Defendants' decision not to turn over custody immediately to the mothers of the infants, . . . is not binding upon the plaintiffs and it is by no means final. Section 383 permits a parent to obtain custody upon order of the court. The New York Supreme Court, as successor to the prerogative of the Chancellor, acting on behalf of the State as parens patriae, is vested with the sole jurisdiction to determine the custody of minor children in the State of New York. . . . (citing cases) . . . The court acts solely in the interests of the infants and is not bound by the administrative determination of any agency. Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937 (1925). In such a habeas corpus proceeding, although the court would be entitled to consider the facts uncovered by the authorized agency and its recommendations, the court must make its own independent decision and the burden would be upon the defendants to establish that the parent seeking custody is unfit and that the child's welfare requires that custody be retained by the authorized agency. . . .

The lack of finality in the authorized agency's action, coupled with the existence of a prompt state judicial remedy in a de novo proceeding wherein the burden would be on the defendants, assures the plaintiffs of procedural due process. It has long been recognized that in such a context the right to a

> full judicial hearing, in which the court makes its own determination on the basis of evidence independently received by it, assures due process under the Fourteenth Amendment and that constitutional rights are not denied by the interim non-final decision of a state agency. Bourjois, Inc. v. Chapman, 301 U.S. 183, 189 57 S.Ct. 691, 81 L.Ed. 1027 (1937); Columbia Auto Loan, Inc., v. Jordan, 90 U.S.App.D.C. 222, 196 F 2d 568 (1952); Randell v. Newark Housing Authority, 384 F 2d 151, 156 (3rd Cit. 1967); see Thorpe v. Housing Authority of the City of Durham, 386 U.S. 670, 678, 87 S.Ct. 1244, 18 L.Ed. 2d 394 (1966). (underscoring added)

Boone was affirmed by the Court of Appeals and the United States Supreme Court's denial of certiorari must be treated as an affirmance. The District Court was eminently correct in holding that Boone was the controlling case in the Circuit at the time of the facts complained of and in dismissing the first and second causes of action.

Appellants, in a vain attempt to distinguish Boone, make a distinction where there is no difference. Boone, they tell us, involved an initial valid commitment by a parent and this case did not. But this is a specious argument. Here the District Court on the facts determined the initial placement of these children to be valid (A-44). The District Court's findings are clearly supported by the record.

First, there can be no real question raised as to the propriety of the infants' initial placement in this case nor was that the issue that Boone confronted. Aside from the fact that appellants conceded during the trial that the initial placement was proper, the District Court found that the facts established conclusively that they were "destitute" in need of emergency placement.* The facts stand uncontroverted - the infants were homeless, their mother incapacitated and hospitalized due to her recurrent mental illness, and the person with whom she left them was woefully incapable of meeting the needs of a seven year old and a six month old baby. The alternative to their immediate placement by the Commissioner which appellants suggest does not comply with the dictates of a humane society. The only real issue in Boone and herein is whether plaintiffs were denied due process by the continued retention of custody by the agencies over plaintiffs' objection and without a hearing. Boone v. Wyman, supra, we submit, disposes of this claim decisively and of this appeal.

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*The pre-trial order entered herein confirms this obvious fact. "Plaintiffs state that 'the sole issue with respect to liability is whether defendants legitimized their custody of Daniel Cruz and Marisol Lopez by obtaining either a court order or written consent.' " (A-42)

Appellants next digress into extended argument that the purported violation of state statutes by these charitable instituitions somehow ipso facto constitutes a violation of the Civil Rights Act.* They base this not on any facts proven at trial, but rely instead on disparate phrases snipped from In re Daniel C., Appellate Division decision, 47 A D 2d 160 (1st Dept. 1975) and from dicta in Perez v. Sugarman, 499 F 2d 761 (2nd Cir. 1974). Neither case stands for the proposition appel lants' counsel urges.

The Appellate Division sustained the lower Court's dismissal of the Writ of Habeas Corpus, a decision which necessarily determined the best interests of these children would be served by their continuation in foster care. cf. Bennett v. Jeffreys, 40 N Y 2d 543 (1976). As to the lower Court's finding of neglect, the Appellate Division reversed and remanded for a new trial to afford the plaintiff Perez an opportunity to rebut the charges:

> "While it is recognized that the hearing was somewhat lengthy and that the Court evidenced genuine concern, petitioner should have been afforded

*This District Court considered and rejected this line of reasoning (A-39). cf. Rosenberg V. Martin, 478 F 2d 520 (2nd Cir. 1972), cert. den., 414 U.S. 872 (1973).

> an opportunity to present her evidence to rebut the charge and to negative, if she could, any evidence of substantial probability of neglect or future harm to the children.
>
> On the evidence before the Family Court [i.e. testimony of three psychiatrists, social workers and hospital and clinical records], we conclude that the Court properly dismissed the habeas corpus petition.
>
> Accordingly, the order . . . appealed from should be modified to strike the finding of neglect and to remand the matter to Family Court for a hearing on that issue and as so modified the order is otherwise affirmed without costs." (underscoring added) id at 165

This is far different from the proposition that appellants have cited it for.

The Court of Appeals' earlier determination in Perez dealt solely with a jurisdictional issue as Judge Metzner correctly noted and did not involve a determination on merits as appellants imply.

In neither case did either Court determine that appellants' civil rights were violated.

We deal here with the Civil Rights Act and that act exclusively. We need not address ourselves to state statutes other than to note that New York State provides for the emergency placement of children when their immediate welfare is endangered. Section 398 Social Services Law.

But in any event, Boone holds that during the time in question appellants' Civil Rights were not violated since there was always available a prompt judicial remedy provided by Section 383 of the Social Services Law.* Boone alone is dispositive of this appeal.

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*Of course, the subsequent Supreme Court decision in Stanley v. Illinois, 405 U.S. 645 (1972) may have lessened the impact of Boone today. However, Boone was the law during the time the events complained of occurred. Nor can these agencies be expected to predict changes in the law.

> "For an official has, of course, no duty to anticipate unforeseeable constitutional developments." Donaldson v. O'Connor, 422 U.S. 563 (1975)

POINT TWO

SINCE THERE WAS NO PERVASIVE STATE ACTION INVOLVED, THE DISTRICT COURT LACKED JURISDICTION OVER THESE PRIVATE INSTITUTIONS

Although this Court has previously determined that jurisdiction exists over these private child care agencies, Perez v. Sugarman, supra, we respectfully submit that the decision was critically undermined by subsequent United States Supreme Court holdings.

Perez predated Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).* The issue in Jackson was whether the termination of electric utility services by a privately owned public utility company during a dispute over non-payment constituted state action violative of the Fourteenth Amendment under 42 U.S.C. §1983. The Supreme Court conceded that Metropolitan Edison enjoyed a near monopoly in York, Pennsylvania, that state public utility commission regulations were extensive and detailed, and that Metropolitan rates were approved (including a recital of prior termination practices) by the state utility commission. It found, however,

*Perez v. Sugarman was decided June 7, 1974, and Jackson v. Metropolitan Edison Co., was decided December 23, 1974.

that the established termination procedures themselves were not expressly approved by the commission. The Court held,

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Id., at 176-177. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952). It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. Moose Lodge No. 107, supra, at 176.
>
> * * *
>
> Petitioner advances a series of contentions which, in her view, lead to the conclusion that this case should fall on the Burton side of the line drawn in the Civil Rights Cases, supra, rather than on the Moose Lodge side of that line. We find none of them persuasive.
>
> * * *
>
> Petitioner next urges that state action is present because respondent provides an essential public service required to be supplied on a reasonably continuous basis by Pa. Stat. Ann., Tit. 66, § 1171 (1959) and hence performs a

"public function." We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. See, e.g., Nixon v. Condon, 286 U. S. 73 (1932) (election); Terry v. Adams, 345 U. S. 461 (1953) (election); Marsh v. Alabama, 326 U. S. 501 (1946) (company town); Evans v. Newton, 382 U. S. 296 (1966) (municipal park). If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State.

* * *

Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses "affected with the public interest" are state actors in all their actions.

We decline the invitation for reasons stated long ago in Nebbia v. New York, 291 U. S. 502 (1934).

* * *

Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State. 419 U. S. 350-354 (underscoring added).

We submit that Jackson v. Metropolitan Edison severely limits both Burton v. Wilmington Parking District, 365 U. S. 715 (1961) and Evans v. Newton, 382 U. S. 296 (1966), the cases upon which Perez put its principal reliance. There was no more nexus here between the state and the Foundling Hospital's and St. Joseph's Home of Peekskill's unnamed social workers than there was between the state and Metropolitan Edison's termination procedures. We submit that Jackson v. Metropolitan Edison severely limits Perez. v. Sugarman.

Indeed, Judge Johnson of the United States District Court in Alabama, in a case involving extreme racial and religious discrimination in the placement of children by Alabama child care agencies, agencies having the same "state" attributes and "state" relationship as do New York child care agencies, found Perez v. Sugarman inconsistent with Jackson v. Metropolitan Edison Co. and, therefore, no longer valid. Player v. Alabama Dept. of Pensions and Security, ___ F. Supp. ___ (N.D. Ala. Civil Action No. 3835-N, August 8, 1975).

Nor does the existence of State funding sup-

port the conclusion that the State is inextricably entwined in these agency affairs. Such insinuation would obviously clash with the constitutional prohibition against State involved with religion. Lemon v. Kurtzman, 403 U. S. 602 (1971). This Court has previously decided that these very agencies despite state reimbursement for services rendered does not run afoul of such prohibitions. Wilder v. Sugarman, 73 Civ. 2644.

Appellants argue excessive entanglement by the state exists because the state has reserved the right to inspect the facilities of the voluntary agencies. Of course, New York has the right to inspect those facilities to insure compliance with fire regulations, sanitary regulations, medical and dental regulations, etc. It has an obligation to do so if it is to insure compliance by the agency with the terms of its contract for services. It also has the right to insure that the agencies are respecting the child's religion and his parent's preference in religion. This is not sufficient entanglement by government to color agency actions with State action. Accordingly, the District Court lacked jurisdiction over these private child care agencies.

POINT THREE

AS A MATTER OF LAW NO LIABILITY CAN BE IMPOSED UPON AND NO DAMAGES CAN BE ADDRESSED AGAINST DEFENDANTS-APPELLEES, THE NEW YORK FOUNDLING HOSPITAL AND ST. JOSEPH'S HOME OF PEEKSKILL, UNDER 42 USC § 1983

A

LIABILITY

The allegations of the complaint, as they purport to be directed at The New York Foundling Hospital and St. Joseph's Home of Peekskill, allege only a failure, by an unnamed social worker, to discharge the infant plaintiffs to plaintiff Perez. Appellants seek damages from defendants-appellees under 42 USC § 1983.

Whether a liability may be imposed upon defendants-appellees as a principal responsible for the acts of their agents under state law is not the issue here. The only issue we address under this point is whether liability can be imposed, or damages recovered, under 42 USC § 1983, against defendants-appellees.

There is no allegation in the complaint that a named employee of the agencies personally refused plaintiff Perez's request. There can be no allegation raised that any of the agencies' employees maliciously, wantonly or recklessly withheld these children from plaintiff Perez

since the jury explicitly found no intention to cause plaintiffs any emotional distress. We see no difference between the assertion of a claim made here and the claim against the Mayor of Philadelphia dismissed in Rizzo v. Goode, 44 U.S.L.W. 4095 (January 21, 1976):

> "The findings of fact made by the District Court at the conclusion of these two parallel trials - in sharp contrast to that which respondents sought to prove with respect to petitioners [Mayor, City Managing Director and Police Commissioner] - disclose a central paradox which permeates that Court's legal conclusions. Individual police not named as parties to the action were found to have violated the constitutional rights of particular individuals, only a few of whom were parties plaintiff. As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or polity by petitioners -- express or otherwise -- showing their authorization or approval of such misconduct." 44 U.S.L.W. at 4098 (underscoring in original)

Rizzo v. Goode confirms repeated holdings of innumerable federal courts:

> "Where the relief sought under the Civil Rights Act is monetary damages, rather than equitable relief, the doctrine of respondeat superior is not available to impose vicarious liability upon a defendant who has no

personal involvement in the alleged deprivation of plaintiff's federally asserted rights." Jennings v. Davis, 339 F. Supp. 919, 921 (W.D. Mo. 1972)*

B

COMPENSATORY DAMAGES

Appellants' claim for damages is predicated upon 42 U.S.C. § 1983. Compensatory damages admittedly are recoverable under this section, but only in a proper case. The public officials who are defendants herein would be immune from compensatory damages unless it be shown that they acted "with such impermissible motivation or with such disregard of [plaintiffs'] clearly

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*For cases in accord see: Harty v. Rockefeller, 338 F. Supp. 367 (S.D.N.Y. 1972); Lathan v. Oswald, 359 F. Supp. 85 (S.D.N.Y. 1973); Jennings v. Davis, 339 F. Supp. 919 (W.D.Mo. 1972); Hampton v. Chicago, 339 F. Supp. 695 (N.D. Ill. 1972); Bennett v. Gravelle, 323 F. Supp. 203, (D.C. Md. 1971) aff'd. 451 F 2d 1011 (4th Cir. 1972) cert. dismd. 407 U.S. 917 (1972); Barrows v. Faulkner, 327 F. Supp. 1190 (N.D.Okla. 1971); Bichrest v. School Dist., 346 F. Supp. 249 (E.D.Pa. 1972); "where the relief sought under the Civil Rights Act is monetary damages, rather than equitable relief, the doctrine of respondeat superior is not available to impose vicarious liability upon a defendant who has no personal involvement in the alleged deprivation of plaintiffs' federally protected rights"; Runnels v. Parker, 263 F. Supp. 271 (C.D. Cal. 1967); Patrum v. Martin, 292 F. Supp. 370 (W.D.Ky. 1968); Mack v. Lewis, 298 F. Supp. 1351 (S.D.Ga. 1969); Sanberg v. Daley, 306 F. Supp. 277 (N.D.Ill. 1909).

established constitutional rights that [their] action cannot reasonably be characterized as being in good faith." Wood v. Strickland, 420 U.S. 308 (1975). (Bracket inserts added) It is safe to say that the rule of Wood v. Strickland, applied there to public school administrators, is applicable to public child welfare administrators. See Gilmore v. Gordon, 422 F 2d 860 (9th Cir. 1970) cert. den., 400 U.S. 837 (1970), rehearing denied, 400 U.S. 954 (1970); Westberry v. Fisher, 309 F. Supp. 12 (D.C. Me. 1970).

Appellants have alleged that these voluntary agencies are performing a public function, that they are joined with the defendant public officials in a practical partnership to administer the child care laws and the adoption laws of New York. The Court of Appeals upheld this contention, 499 F 2d 764 (2nd Cir. 1974). These voluntary child care agencies offer the experience, the expertise, the dedication of serving New York City children for over a period of one hundred and fifty years. It would frustrate a sensible policy of attracting others and keeping them in this area of public concern, where their services are in critical demand, were their liability for damages to be measured by standards less protective than those which protect the public administrators who work in

partnership with them. Wood v. Strickland offers only a minimal privilege for public officials. See opinion of Mr. Justice Powell (dissenting) 420 U.S. 305, 312, with respect to the policy fostered by, and governmental interest in, seeking competent citizens for the education of our children. However minimal the protection which Wood v. Strickland would provide for all defendants in this case, it is enough to nullify plaintiffs-appellants' claims for compensatory damages.

PUNITIVE DAMAGES

Punitive damages are allowed only where the wrong is aggravated by evil motives. To warrant an award of punitive damages it must appear that there was actual malice on the part of the defendant or such wantonness or recklessness in his action as to imply or permit the inference of such malice. When and if one of these elements is found, punitive damages may be rewarded, but it is not required.

Nor are appellants' entitled to punitive damages. The traditional common law criterion for the award of punitive damages was thoroughly reviewed and accurately

stated by Judge Fuld in Walker v. Sheldon, 10 N Y 2d 401 (1961):

> Punitive and examplary damages have been allowed in cases where a wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant, but to deter him as well as others who might be so prompted, from indulging in similar conduct in the future. 10 N Y 2d at 404.

The Court further stated that an award of punitive damages requires a showing of a "high degree of moral turpitude" and "such wanton dishonesty as to imply criminal indifference to civil obligations." 10 N Y 2d at 405. See also Bond v. Stanton, 372 F. Supp. 872, holding that "as against the individual defendants there is no showing of willful and malicious actions by said defendants to deprive plaintiffs of their civil rights. Absent such evidence punitive damages will not be assessed." 372 F. Supp. at 876.

Therefore, there is immunity from liability unless the defendants-appellees, The New York Foundling Hospital and St. Joseph's Home of Peekskill, knew or reasonably should have known that their actions would violate plaintiffs' constitutional rights or if they acted with malicious intent. Wood v. Strickland, 420 U.S. 308 (1975).

C

IMMUNITY

Aside from the common law immunity discussed above, we believe that both The New York Foundling Hospital and St. Joseph's Home of Peekskill are immune from liability. New York has expressly provided immunity from liability to institutions acting in good faith in retaining custody of a child.

Section 1024(c) of the Family Court Act, effective May 1, 1970, provides:

> § 1024. Emergency removal without court order.
>
> (c) Any person or institution acting in good faith in the removal or keeping of a child pursuant to this section shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed as a result of such removal or keeping.

This statutory immunity exceeds the common law immunity previously discussed herein above. Although the Court did not specifically address this issue, we believe that the jury's verdict supports the conclusion that the agencies were acting in good faith. The facts below convincingly demonstrate the agencies' paramount

concern for the best interests of these infants and hence their good faith. There is ample support in the record to reinforce the soundness of the agencies action through the period in question.

Accordingly, the Court should find that the New York Foundling Hospital and St. Joseph's Home of Peekskill acted in good faith in the keeping of the children, Marisol Lopez and Daniel Cruz, and as such are immune from any civil liability resulting from that placement. In view of the total circumstances, there can be no question that the agencies acted in good faith, based on the best interests of the children involved.

POINT FOUR

ATTORNEYS' FEES AND COSTS SHOULD BE AWARDED TO THESE PRIVATE CHARITABLE INSTITUTIONS FOR DEFENDING AGAINST THIS PATENTLY FRIVOLOUS APPEAL

The New York Foundling Hospital and St. Joseph's Home of Peekskill are charitable, private child caring agencies which have for an excess of 100 years ministered with untold dedication and expertise to the needs of dependent and neglected children such as Daniel Cruz and Marisol Lopez. Ironically, since 1972, they have been unfairly enmeshed in this morass of litigation* brought nominally in the names of those infants they have so well provided for, at great financial cost and expense. Now, after having been vindicated after trial, they have been made to expend further

*Since 1972, both agencies have successfully defended against a Writ of Habeas Corpus brought by appellant, In re Daniel C., 365 N.Y.S. 2d 535 (Fam. Ct., N.Y. Co., 1974) affd. 47 A D 2d 160 (1st Dept. 1975); a Writ of Habeas Corpus brought by the administratrix Duchesne in 1976 in New York Supreme Court (Index No. 40576/76). Both agencies, of course, have been in this suit which has been too much litigated, Perez v. Sugarman, 499 F 2d 761 (2nd Cir. 1974) as well as in Family Court neglect proceedings involving the same parties from 1972 to the present. Additionally, the guardianship of Marisol has been transferred to The New York Foundling Hospital with authorization to consent to her adoption by her foster family (Family Court Docket No. G-2066/76).

sums of money to defend their good works and reputations, moneys which, needless to say, could have been more properly expended on projects such as The New York Foundling Hospital's abusing mother or day care programs. Accordingly, these defendants request that this Court award them costs and reasonable attorneys' fees for the expenses incurred in defending against this frivolous appeal. Rules 38 and 39 of the Federal Rules of Appellate Procedure.

This is a frivolous appeal. Judge Metzner so indicated by order dated July 14, 1976, and this Court concurred in the correctness of that determination on August 17, 1976, in denying plaintiffs-appellants' leave to appeal in forma pauperis. The real question now raised is whether this Court will sanction the plaintiffs-appellants' imposition of financial hardships on the defendants-appellees which has caused these charitable organizations to further divert depleted funds from essential services to defend against these specious allegations. It is inequitable to permit plaintiffs-appellants and their counsel to continue this vexatious litigation without penalty, while requiring

the financially hard pressed private agencies providing essential services to defend against such actions.

It should also be noted that defendants-appellees have already been burdened with at least five motions on this appeal in addition to the trial below and appeal herein.

It is well within the equitable powers of a federal court to award attorneys' fees even in the absence of a statutory provisions or contractual obligation. Hall v. Cole, 412 U.S. 1 (1973); Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Incarcerated Men of Allen County Jail v. Fair, 507 F 2d 281 (6th Cir. 1974); Fairley v. Patterson, 493 F 2d 598 (5th Cir. 1974). In Hall v. Cole, supra, the Supreme Court made it clear that the power to award attorneys' fees may be freely exercised when such an award is needed to furth he interests of justice.

> "Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' . . .

> and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.'" (Citations and footnotes omitted) 412 U.S. 1 at 4-5

The broad equitable powers of the court will be exercised to award costs and attorneys' fees when one party, in its maintenance or conduct of the litigation, has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." F. D. Rich Co., Inc. v. Industrial Lumber Co., Inc., 417 U.S. 116, 129 (1974); Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975). See also, Hall v. Cole, supra; 6 Moore's Federal Practice ¶ 54.77 [2], p. 1709 (2d ed. 1974). The purpose of an award of counsel fees on bad faith grounds is to "deter and punish unwarranted personal conduct, both before and during litigation." Incarcerated Men of Allen County Jail v. Fair, supra., 507 F 2d 281 at 284 (emphasis added).

The rule that attorneys' fees will be awarded to parties suffering from bad faith actions authorizes an award of attorneys' fees to defendants as well as to plaintiffs. e.g., Kinnear-Weed Corp. v. Humble Oil &

Refining Co., 441 F 2d 631 (5th Cir.) cert. den., 404 U. S. 941, Reh. den., 404 U. S. 996 (1971). As the Court made clear in dictum in Natural Resources Defense Council, Inc., v. E.P.A., 484 F 2d 1331, 1338 (1st Cir., 1974), the rule also applied to awards of counsel fees to defendants in actions brought by organizations purporting to bring litigation in the public interest:

> "Were we to believe that the litigation were wholely or in substantial part frivolous, we would not, of course, award costs of any description to petitioners. In such cases, indeed, we reserve the right to award costs and fees in favor of the EPA. But the challenges here, even those not sustained, were mainly constructive and reasonable."

The bad faith of the plaintiffs-appellants is readily apparent from the history of the litigation of which this lawsuit is a part, as well as from their vexatious conduct herein. Plaintiffs-appellants have unnecessarily burdened this Court and defendants-appellees with issues and arguments not germane to the relatively simple issue raised by this appeal.

The appellants' counsel is the proper party to be assessed attorneys' fees. Costs may be taxed against an attorney who "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously. . . ."

28 U.S.C. § 1927. See also, Stillman v. Edmund Scientific Co., 522 F 2d 798 (4th Cir. 1975) (attorney assessed for fees and expenses flowing from abuse of discovery process). The fact that the conduct of the appellants' counsel has "unreasonably and vexatiously" increased the costs of this litigation make it appropriate to tax the appellants for the charitable institutions' attorneys' fees.

This suit was originally commenced by Mobilization for Youth (hereinafter "MFY"). Plaintiffs-appellants' counsel was then and is now the attorney who has prosecuted this case, even though her association with that office has terminated. Appellants' counsel's motivation in pursuit of this case is suspect. Plaintiff Perez died during the course of the litigation and Josephina Duchesne, maternal grandmother, was substituted as Administratrix. However, Ms. Duchesne has been precluded by the New York Supreme Court (Index No.4057676) from visiting the infant plaintiff Marisol, who is in the process of being adopted by her foster family* (Family Court Docket No. G-2066/76).

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*This Court may properly take judicial notice of these facts.

The administratrix's interest in pursuing this suit on behalf of the infants is equally suspect. Not only is Daniel Cruz doing well and happy at St. Joseph's Home of Peekskill, while Marisol Lopez is happy in virtually the only home she has ever known, but the record shows Daniel did not want to return home. It is obvious that the Civil Rights Act never intended to countenance the vexatious litigation engendered by appellants in this suit.

It would be both manifestly unfair and useless to tax the indigent named plaintiffs for attorneys' fees awarded because of the appellants' counsel's bad faith in continuing this action against these charitable agencies. The appellants' counsel is responsible for pursuing the tactics in which it has engaged, and since the plaintiffs are essentially vehicles for the vindication of the theories of the appellants' counsel, she, rather than the named plaintiffs, should bear the consequences.

It is particularly appropriate that she bear the burden of paying the costs and reasonable attorneys' fees which have been incurred by The New York Foundling

Hospital and St. Joseph's Home of Peekskill. The New York Foundling Hospital and St. Joseph's Home of Peekskill are both non-profit agencies which depend on support from the public. However, the funds received by them are meant to be used for the benefit of children; they are not provided to conduct litigation. These charitable institutions suffered through the trial of this case and answered the numerous motions of appellants at considerable expense to establish once and for all that they have not and do not trammel upon the rights of the children and families entrusted to their care. Nevertheless, the appellants' counsel filed this frivolous appeal.

We have now reached a point in this case where the time has finally arrived to end this case against The New York Foundling Hospital and St. Joseph's Home of Peekskill and put an end to the diversion of funds, desperately needed for child care, to pay for the defense of litigation totally without merit.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed and an order should be entered directing the appellants' counsel to pay for the costs and attorneys' fees in connection with this appeal on behalf of defendants-appellees, The New York Foundling Hospital and St. Joseph's Home of Peekskill.

Respectfully submitted,

(A Member of the Firm)
BODELL & MAGOVERN, P. C.
Attorneys for Defendants-Appellees
The New York Foundling Hospital
and St. Joseph's Home of Peekskill
102 East 35th Street
New York, New York 10016
(212) 686-1900

Dated: New York, New York
March 31, 1977

FREDERICK J. MAGOVERN
Of Counsel

EV.)-35-M SETS 10-1098(70)

F 10372

Re! 30 F

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

Bellevue Psychiatric
HOSPITAL

Date 5/17/72

CONFIDENTIAL ABSTRACT OF MEDICAL RECORDS (NON-FEE)

SENT TO

Mr. Joseph Di Scipio
The New York Foundling Hospital
Bronx Branch Office
390 East 150th Street
New York, New York 10455

PATIENT IDENTIFICATION

LAST NAME	FIRST	MIDDLE OR MAIDEN	AGE	SEX
PEREZ	Pauline		6/22/1941	F
ADDRESS	646 East 6th Street, NYC			
ADMITTED TO HOSPITAL	yes	HISTORY No.	08-21-76-1	
DATE ADMITTED	see below	DATE DISCHARGED		
TREATED IN O.P.D. OR EMERGENCY CLINIC		HISTORY No.		
DATES TREATED FOR THIS CONDITION				

(Include pertinent and significant information pertaining to:
Chief Complaints, Previous History, Diagnosis, Laboratory and X-ray Findings,
Course and Treatment in Hospital, Disposition.)

Mrs. Perez has had multiple contacts and admissions at Bellevue dating from 1960:

1. 8/22/60 - 8/25/60. Suicide attempt. DIAGNOSIS: Mental Deficiency in an emotionally unstable person. Discharged custody of mother.
2. 12/25/60 - 12/30/60. Attempted suicide. DIAGNOSIS: 1. Depressive Reaction. 2. Acute Brain Syndrome associated with alcoholism.
3. 10/18/62 - 10/29/62. An acute schizophrenic episode. Certified to Central Islip State Hospital. DIAGNOSIS: Schizophrenia.
4. 9/12/63 - 9/17/63. Patient had decompensated. Discharged custody of mother. DIAGNOSIS: Schizophrenia.
5. 4/27/66 - 5/17/66. Patient became grossly paranoid. Discharged custody of mother. DIAGNOSIS: 1) Schizophrenic Reaction, CUT. 2) Incomplete Abortion.
6. 12/26/66 - 1/9/67. Delusional and hallucinating. Discharged custody of father. DIAGNOSIS: Schizophrenic Reaction, Chronic Undifferentiated.
7. 1/22/68 - 1/30/68. Bizarre behavior, paranoid delusions and hallucinations. Transferred to Central Islip. DIAGNOSIS: Chronic Schizophrenia, Paranoid Type.
8. 12/30/67 - 1/16/68. Unable to function outside hospital. Discharged to family against medical advice. DIAGNOSIS: Chronic Schizophrenia with acute exacerbation.
9. 12/16/69 - 12/22/69. Discharged to family for OPD care. DIAGNOSIS: Schizophrenia, Paranoid Type.
10. 12/26/69 - 1/19/70. Suicidal ideation, obsessed with religion. Transferred to Central Islip. DIAGNOSIS: Schizophrenia, affective, excited.
11. 10/5/70 - 10/16/70. Religious obsessions. Discharged c/o husband. DIAGNOSIS: Schizophrenia, Paranoid Type.
12. 10/31/70 - 11/10/70. See Summary.
13. 11/11/71 - 11/15/71. See Summary.
14. 12/01/71 - 12/6/71. See Summary.
15. 2/15/72 - 2/25/72. See Summary.
16. 3/06/72 - 3/22/72. Bizarre behavior, religious delusions. Transferred to Manhattan State, Dunlap Division. DIAGNOSIS: Schizophrenia, Paranoid Type. Copy of Psychological Report attached.

Signed
Edward A. Stolzenberg
Assistant Director

rlg:ar
enclosures

Re: Ques 7F
9D

The City of New York

DEPARTMENT OF SOCIAL SERVICES
BUREAU OF CHILD WELFARE
80 Lafayette Street
New York, N.Y. 10013

To the Managers of Child-Caring Agency:

St. Joseph's Home Of Peekskill
250 South Street
Peekskill, N.Y. 10566

Fold

Fold

AUTHORIZATION FOR ADMISSION OF CHILD TO FOSTER CARE

(Voluntary Placement)

Child's Surname	First Name	BCW Case Number
Cruz,	Daniel	2978607

Child's Birthdate	Sex	Religion
9-23-62	M	P

Date of Admission	Code No.	Reason for Admission
12-17-69	05	Mental illness of person caring for child.

You are hereby authorized to receive as a charge against The City of New York the child described herein and to retain said child until further notice, pursuant to law, the rules of the State Board of Social Welfare, and the policies and procedures established by the Department of Social Services and the Office of the Comptroller of The City of New York.

John A. Cruz

Signature of Deputy Commissioner of Social Services

1/22/70
Date of Signature

Form W-850
Rev. 11/10/67

The City of New York

DEPARTMENT OF SOCIAL SERVICES
BUREAU OF CHILD WELFARE
80 Lafayette Street
New York, N.Y. 10013

To the Managers of Child-Caring Agency:

New York Foundling Hospital
175 Third Avenue
New York, New York 10021

Fold

Fold

AUTHORIZATION FOR ADMISSION OF CHILD TO FOSTER CARE

(Voluntary Placement)

E.A.F.

Child's Surname	First Name	BCW Case Number
(Perez,) Lopez,	Marisol	2978607

Child's Birthdate	Sex	Religion
6/8/69	F	Prot.

Date of Admission	Code No.	Reason for Admission
12/17/69	05	Mental illness of person caring for child

You are hereby authorized to receive as a charge against The City of New York the child described herein and to retain said child until further notice, pursuant to law, the rules of the State Board of Social Welfare, and the policies and procedures established by the Department of Social Services and the Office of the Comptroller of The City of New York.

Signature of Deputy Commissioner of Social Services

3-2-70
Date of Signature

15036

Form W-850
Rev. 11/10/67

(: NEW YORK FOUNDLING HOSP IL
1175 THIRD AVENUE, NEW YORK, N. Y. 10021

CONSENT AND RELEASE FORMS

Consent for Treatment

Date 12-23- 1969

I, the undersigned, hereby consent to and authorize the medical and surgical treatment to _____ which the Doctors
Name of Patient
in attendance at New York Foundling Hospital deem advisable. This consent includes treatments, medications, diagnostic procedures and immunizations.

Signed Pauline Perez

Witness _____ Relationship mother

Consent for Baptism

Date _____ 19____

I, the undersigned, request the New York Foundling Hospital to have my child _____ baptized in the Roman Catholic Faith.

Signed _____

Witness _____ Relationship _____

Consent for Publicity

Date 12-23-1969

I, the undersigned, give my consent to the New York Foundling Hospital for my child to appear on television and for the use of his/her pictures for publicity purposes with the understanding that his/her name will not appear.

Signed Pauline Perez

Witness _____ Relationship mother

S 507

CONSENT FOR CHILD'S ROUTINE MEDICAL AND DENTAL CARE

I, Pauline Perez hereby give my consent for routine medical and dental care to the child or children listed below while under the care of ST. JOSEPH'S HOME OF PEEKSKILL or any person or agency acting as the agent of ST. JOSEPH'S HOME OF PEEKSKILL.

This medical care may include physical examinations, immunization against communicable diseases and any necessary tests which in the opinion of the physician designated by the agency, are deemed necessary or advisable.

This does not include the right to perform surgical operations without my further consent, except in the case of an emergency and when after an effort has been made to locate me, I am found to be unavailable.

NAMES	BIRTHDATES	NAMES	BIRTHDATES
CRUZ, DANIEL	9/23/62		

Signature Pauline Perez

Relationship mother

Witness Marianne K. Colonna

(PLEASE SIGN AND RETURN)

Date 2/20/70

Has child or children had any of the following diseases: (PLEASE CHECK)

Measles

German Measles

Chicken Pox

Whooping Cough

Scarlet Fever

Mumps

St. Joseph's Home of Peekskill, N. Y.

250 SOUTH STREET

PEEKSKILL, N. Y.

Date: _____

I hereby give my consent to have my son Daniel Cruz baptized at St. Joseph's Home, Peekskill, New York.

Signed Carlina Cruz

Date March 27/1971.

Witness Lucy Rubert

STATE OF NEW YORK)
: ss.: AFFIDAVIT OF SERVICE
COUNTY OF NEW YORK)

LORRAINE LORIA GIAMPINO, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides in Yonkers, New York.

On March 31, 1977, deponent served the within Brief for Dependants-Appellees upon the attorneys in this action:

LISA BLITMAN - attorney for Plaintiffs-Appellants
24 West 87th Street
New York, New York 10024

KEVIN SHERIDAN, Esq. - Corporation Counsel
Municipal Building
New York, New York 10007

by depositing three true copies of same to Ms. Blitman, and one true copy of same to Mr. Sheridan, enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Lorraine Loria Giampino
LORRAINE LORIA GIAMPINO

Sworn to before me this
31st day of March 1977

Patricia L Romanello
Notary Public

PATRICIA L. ROMANELLO
Notary Public, State of New York
No. 60-4634682
Qualified in Westchester County
Commission Expires March 30, 1978